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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1564

VINCENT J. BERNABEI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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To The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The Petitioner, Vincent J. Bernabei, petitions the Court for a rehearing of the order of this Court rendered on October 9, 1973, denying the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Sixth Circuit rendered on February 28, 1973, and reaffirmed April 26, 1973, affirming the United States District Court for the Northern District of Ohio, Eastern Division.

A. CERTIFICATE

This petition is presented in good faith and not for delay, and is restricted to grounds of substance although not fully and previously presented, and which grounds are of substantial and controlling effect.

.....

John Kennedy Lynch
Attorney for Petitioner

B. GROUNDS

Grounds for this petition for rehearing are as follows:

1. The Supreme Court of the United States, in denying certiorari, failed to apply its interpretation of the meaning of the word, "willfully", in the misdemeanor statute contained in Section 7203 of the Internal Revenue Code as defined and interpreted by this Court in its opinion rendered May 29, 1973, in *United States* v. *Bishop,* 93 Supreme Court 2008.

ARGUMENT AMPLIFYING GROUNDS FOR PETITION FOR REHEARING

The question raised by the Petition for Writ of Certiorari was based on a conflict existing between the United States Court of Appeals for the 4th Circuit (*Yarborough* v. *United States,* 230 F2 56, cert. den. 351 US 696) and the Ninth Circuit (*United States* v. *Haseltine,* 419 F2 579). In *Yarborough* the Court approved instructions to the Jury that the testimony that the Defendant did not have sufficient cash to pay the tax was evidence that the Jury had a right to consider along with all other facts. To the contrary,

Haseltine held that the trial Court's rejection of evidence related to Defendant's inability to pay taxes was proper.

In the present case, taxpayer Bernabei was not permitted to introduce evidence of his financial problems and marital difficulties to offset the inference of criminal intent. Since this Petition was filed in this Honorable Court, the *United States* v. *Bishop,* 93 Supreme Court 2008, has held that the meaning of the word "willfully" in tax offenses, set forth in Section 7201 to 7207 inclusive of the Internal Revenue Code, has the same meaning and requires proof of bad faith or evil intent; the Court pointed out that the Ninth Circuit in *Abdul* v. *United States,* 278 F2 234, – which involved conviction of tax misdemeanors under Section 2707 (b) of the 1939 Code and Section 7203 of the 1954 Code, based on failure to file involving the defense of inability to pay, – the trial Judge instructed the Jury that the term willful in the misdemeanor counts meant, among other things, "capriciously or with a careless disregard whether one has the right so to act", whereas the same word in the felony counts meant "with knowledge of one's obligation to pay the taxes due and with intent to defraud the Government of that tax by any affirmative conduct".

This Court in *Bishop* rejected the approach in the *Abdul* case and adopted the meaning of willfullness as defined in *United States* v. *Murdock,* 290 U.S. 389, 394-395, holding that the meaning of willfull in the felony and misdemeanor tax offenses have the same meaning.

The Court in *Bishop* said in part as follows:

"B. The hierachy of tax offenses set forth in Sections 7201-7207, inclusive, *utilizes the mental state* of the offender as a guide in establishing the penalty. Section 7201, relating to attempts to evade or defeat tax, has been described

and recognised by the Court as the 'climax of this variety of sanctions' and as the 'capstone of the system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.' *Spies,* 317 U.S. at 497; *Sansone,* 380 U.S. at 350-351. *The actor's mental state* is described both by the requirement that acts be done 'Willfully' and by the designation of certain express elements of the offenses. In Section 7201, for example, the Court has held that, by requiring an attempt to evade, 'Congress intended some willfull commission in addition to the willfull omissions that make up the list of misdemeanors.' *Spies,* 317 U.S. at 499. Similarly, in Section 7207, the Government must show that the document was known by the taxpayer to be fraudulent or to be false as to a material matter.

"All these offenses, except two subsections of Section 7206 viz., subsections (3) and (4), require that acts be done 'willfully'. Although the described states of mind might be included in the normal meaning of the word 'willfully', the presence of both an express designation and the simultaneous requirement that a violation be committed 'willfully' is strong evidence that Congress used the word 'willfully' to describe a constant rather than a variable in the tax penalty formula.

"The Court, in fact, has recognized that the word 'willfully' in these statutes generally connotates a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfullness as 'bad faith or evil intent', *Murdock,* 290 U.S. at 398, or *'evil motive and want of justification in view of all the financial circumstances of the taxpayer', Spies,* 317 U.S. at 498, or knowledge that the

taxpayer 'should have reported more income than he did'. *Sansone,* 380 U.S., at 353. See *James* v. *United States* (61-1 USTC par. 9449), 366 U.S. 213, 221 (1961); *McCarthy* v. *United States* (69-1 USTC par. 9312), 394 U.S. 459, 471 (1969).

"Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully', the bad purpose or evil motive described in *Murdock, supra.* We hold, consequently, that the word 'willfully' has the same meaning in Section 7207 that it has in Section 7206 (1)." (Emphasis supplied)

In the subject case, the Respondent, in his memorandum in objection to Petition, argues that this Court in *United States* v. *Bishop, supra,* considers the definition of willfullness as a "voluntary, intentional violation of a known, legal duty", whereas Petitioner relies on the Court's requirement that there be a bad purpose or evil motive.

CONCLUSION

Petitioner implores this Court to reconsider its previous ruling and grant his Petition for Writ of Certiorari so that he may have an opportunity to present in Court in his own defense his financial and marital problems which might counteract any inference of evil motive or bad purpose.

Respectfully submitted,

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